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No. 86-287

In the Supreme Court

of the

United States

CROWN OIL CORPORATION, GRANEX CORPORATION, U.S.A. and PAN-PACIFIC COMMODITIES,
Appellants,

VS.

LAPIDUS POPCORN, INC.
Appellee.

On Appeal from the Court of Appeal of the State of California after Denial of Review by the Supreme Court of California

REPLY IN SUPPORT OF JURISDICTIONAL STATEMENT-STATE CIVIL CASE

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PRELIMINARY STATEMENT

This reply responds to the motion to dismiss appeal submitted by Lapidus Popcorn, Inc. ("Lapidus"), the motion of the State of California ("California"), as amicus curiae, to dismiss or affirm, and the brief of Atlantic Richfield Company, et al. ("Atlantic"), as amicus curiae, in support of the jurisdictional statement.

ARGUMENT

I

THE ISSUE RAISED BY THE DECISION BELOW IS IMPORTANT AND CALLS FOR PLENARY ARGUMENT

In 1978, the California Legislature amended the state antitrust law for the express purpose of assuring that this Court's holding in *Illinois Brick v. Illinois* (1977) 451 U.S. 720—which limits antitrust claims for overcharge damages to direct purchasers—would not be applicable in actions brought in California

state courts. In so doing, California has created the very *risk* of multiple liability that this Court found "unacceptable" (431 U.S. at 731, n. 11; see Jurisdictional Statement, pp. 8-10). In addition, California has impaired the claims of direct purchaser plaintiffs under the federal antitrust laws (see ibid., pp. 10-12), although the encouragement of such claims was one of the purposes of *Illinois Brick* (431 U.S. at 745). The State of California as amicus curiae would have this Court believe that "California's indirect purchaser statute is wholly consistent with Federal law and policy" (California Br., p. 13). However, the California Court of Appeal has declared "that it is the *Illinois Brick* majority decision which frustrates Congress' purpose in creating the treble-damages action" (Jurisdictional Statement, p. A9). The California court has thus acknowledged the direct conflict between state and federal law. In doing so, it has set its interpretation of congressional intent above that of this Court, and it has ignored Congress' refusal to alter the *Illinois Brick* decision (see, particularly, Jurisdictional Statement, p. 10, n. 5).

II

THE DECISION BELOW IS FINAL UNDER 28 U.S.C. SECTION 1257

A. There is no impairment of finality in the procedure by which the constitutional issues were raised below

Lapidus asserts that the procedure by which the constitutional question was determined in the California courts precludes review, citing three 19th century opinions of this Court for the proposition that a decision overruling a demurrer necessarily lacks the requisite finality for review by this Court (Lapidus Br., pp. 2-3).[1] But the very case upon which Lapidus relies to articulate the policy and reasoning behind the finality requirement of section 1257, *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.* (1973) 414 U.S. 156, involved a state-court

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[1] *Clark v. Kansas City* (1899) 172 U.S. 334; *Meagher v. Minnesota Thresher Mfg. Co.* (1892) 145 U.S. 608, 610-611; *McComb v. Commissioners* (1876) 91 U.S. 1.

adjudication which likewise was decided "without an evidentiary hearing," and which was remanded by the state appellate court to the trial court to reconsider the merits " '*sans*' the constitutional question" (id. at p. 162). Rejecting the kind of argument Lapidus makes here, this Court held the order final and reviewable, and pointed out that a contrary rule would impose upon the judicial system "a completely unnecessary waste of time and energy" (id. at 160). That same criterion applies with even greater force here. The constitutionality issue is presented squarely on this appeal, and further proceedings below would not clarify the issue now before this Court.[2]

B. Further litigation would be precluded by a holding of unconstitutionality

Lapidus next erroneously suggests that hearing this appeal would result in piecemeal review (Lapidus Br., pp. 4-5), and that it would not preclude further litigation no matter how the appeal is decided (Lapidus Br., pp. 5-7). Both suggestions are false and rest upon non sequiturs. First, Lapidus points out that indirect purchasers under federal law may have both cost-plus claims and claims for injunctive relief, and that such claims cannot be preempted. But that fact emphasizes that this case is particularly appropriate for review, because no cost-plus claims are asserted here, and no injunctive relief is sought. Second, Lapidus asserts that further litigation would not be precluded because, in fact, there is no preemption (viz., "[n]o federal statutory or constitutional policies are being undermined by the prosecution of this indirect-purchaser suit" (Lapidus Br., p. 6)). But that argument addresses the merits of the issue on this appeal and, by addressing

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[2] Lapidus argued below that, because the constitutionality issue was raised by demurrer, the California courts should avoid reaching the merits. The California courts rejected that argument, and they decided the issue here presented. The Supreme Court of California spoke twice: once to overrule the intermediate appellate court's refusal to address appellants' petition for review on the merits, instructing that court to speak to the merits, and once again to deny review and to let stand the subsequent decision of the appellate court on the merits. The highest court in California thus decided that there were no procedural impediments to consideration of the issue of constitutionality.

the merits, implicitly admits that appellants are correct. The ruling sought by appellants here would, in fact, terminate this litigation.

1. Identifiable Federal policies are being undermined by the continuance of litigation in the state courts

In its brief, California correctly concedes that the preemption issue was the subject of a final decision below.[3] A concession of finality as to the preemption issue disposes of any technical argument as to appealability. This Court has recognized that a state court's final determination of a federal issue is subject to review by appeal if further state court litigation "would seriously erode federal policy" (*Flynt v. Ohio* (1981) 451 U.S. 619, 622) and if "reversal of the state court on the federal issue would be preclusive of any further litigation" (*Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 482-483).[4] This case also involves the requisite "identifiable federal statutory or constitutional policies which would [be] undermined by the continuation of the litigation in the state courts" (*Flynt v. Ohio,* supra, 451 U.S. 622).

Thus, this appeal fits within the criteria of *Cox* and *Flynt.* In *Flynt*, there had been no determination below that the publication in question was obscene, and this court was "confronted only with a state effort to prosecute an unprotected activity, the dissemination of obscenity" (619 U.S. at p. 622). Here, there is no question that indirect purchasers seek to recover the passed-on portion of the alleged overcharge damages, liability for which the direct purchasers have previously discharged by settlement in federal court. Thus, the risk of double recovery, and the impairment of the claims of antitrust claimants seeking settlements or judgments

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[3] "Only * * * preemption was, in any sense, the subject of final decision" (California Br., p. 6).

[4] The dissent in *Cox Broadcasting* expressed its concern for "harmonious state-federal relations" and principles of "comity and federalism" (420 U.S. 505). Here, federal-state relations were disrupted, first, by adoption of the 1978 amendment and, second, by the California Court of Appeal which flatly declared that this Court's opinion in *Illinois Brick* is wrong (Jurisdictional Statement, pp. A8-A9).

as to the entire overcharge damages, are real and unavoidable.[5] The federal policy which this Court announced, and which Congress approved, is seriously eroded.[6]

In this connection, the amicus brief of Atlantic, while helpful in showing the multi-state importance of this issue, is in error in suggesting that a different disposition of the California Supreme Court's decision in the *Union Carbide* case (*Union Carbide Corp. v. Superior Court* (1984) 36 Cal.3d 15, 201 Cal.Rptr. 580, 679 P.2d 14) could possibly have solved the issue of multiple liability presented by California indirect purchaser claims (Atlantic Br., pp. 8-10). Atlantic's argument assumes that, had the *Union Carbide* case been decided differently, California would have the power to require that direct purchasers injured under federal law, wherever located, be brought before a California court. The State of California has no such power. But absent such power, no procedural device—joinder or otherwise—can avoid the problem of double recovery.

Even if the attempt to avoid double recovery were limited to direct purchasers over which the State of California had jurisdiction, any such procedural device must necessarily require that direct purchasers give up a portion of their claims to which they are entitled under federal law to indirect purchasers. This, we submit, emphasizes precisely why California's indirect purchaser

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[5] The federal class involved in this case consisted of *all* direct purchasers of coconut oil. The class which Lapidus seeks to represent consists of all California businesses which purchased coconut oil from the direct purchasers.

[6] Lapidus incorrectly argues that the direct purchaser issue is merely one of "remedy" and (citing *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238 and *Hayfield Northern Railroad Co., Inc. v. Chicago & N.W. Transportation Co.,* (1984) 467 U.S. 622) that state "remedies" are not subject to preemption (Lapidus Br., pp. 4-5). There is no such rule:

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law" (*Gardner v. Teamsters Union* (1953) 346 U.S. 485, 491; accord, *Sola Electric Co. v. Jefferson Co.* (1942) 317 U.S. 173, 176).

claims are preempted and why procedural devices cannot be effective to avoid preemption. The problem is exacerbated by the potential of fifty other rival jurisdictions addressing the same overcharge.

The Atlantic brief, in any event, focuses solely on double recovery, only one of the reasons why indirect purchaser claims are preempted. There are other reasons at least as persuasive if not more so: (1) the impairment of the claims of direct purchasers; (2) the impairment of their motive to bring suit and thus to police compliance with the antitrust laws; (3) the impairment of federal policy in favor of settlement; (4) the reduction of the recovery to direct purchasers in settlements, where the settling parties must necessarily include allocations for state indirect purchasers; and (5) the reintroduction of all the evidentiary complexities and speculations inherent in allocating between direct and indirect purchasers where federal class settlements are presented for approval (see Jurisdictional Statement, pp. 10-12).

In this regard, California argues that "disincentives created by State laws" (California Br., p. 15) are simply a "natural consequence of our Federal system" (Id., p. 16). Inasmuch as this Court has not yet spoken, those disincentives have practical impact everywhere today in private enforcement of the antitrust laws. Judicial economy in the broadest sense, both in this case and as to the many other pending cases in California and other jurisdictions, requires that this issue be decided, and such disincentives be removed once and for all from federal antitrust enforcement. There is no technical impediment to the finality of the decision below for purposes of this appeal; and absent such technical impediment we respectfully submit that it cannot reasonably be urged that the issue is not of sufficient importance to merit plenary consideration.

2. The due process issue is likewise final. Even if it were not, this appeal is proper

Both California and Lapidus argue that "the due process holding [below] is not a final decision" (California Br., p. 3; see Lapidus Br., p. 5). But that is beside the point when, as here, the *Cox* and *Flynt* criteria are met.

Moreover, the argument is circular and misses the point on finality for purposes of this appeal. In holding "the potential for multiple liability in the present case is sheer speculation" (Appx. A-10), the California court stated (in a close paraphrase from the *Illinois Brick* dissent) that it was "confident that when the threat of double liability occurs, the trial court will fashion relief accordingly" (ibid.).[7] In other words, the California court necessarily assumed that, if indirect purchaser claims are allowed, procedural strategies and allocations may possibly prevent double recovery, and thus obviate any due process issue. However, implicit in that assumption is the notion that a state has power to impair the claims of direct purchasers under federal law, since a portion of those claims must necessarily be disallowed in favor of indirect purchasers to avoid the due process issue. The impairment of federal antitrust policy by state indirect purchaser claims cannot be avoided by procedural devices. To restore federal-state harmony, we respectfully submit that this Court should speak now and hold state indirect purchaser statutes preempted.[8]

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[7] By tolerating the "threat of double liability," the California court took the position that this Court was wrong in *Illinois Brick* when it found such "risk" unacceptable and rejected possible procedural strategies as inadequate.

[8] The California court likewise stated that settlements of antitrust lawsuits do not, for due process purposes, dispose of the damages which may be claimed for the acts upon which those lawsuits are based. The California court reasoned that, notwithstanding a settlement of a federal antitrust action with all direct purchasers, under the due process clause an indirect purchaser in California can litigate the issue of the direct purchaser's damages in state court, and if the direct purchasers would have received more than they settled for, the excess may be extracted from the same defendants for the benefit of indirect purchasers (Appx. A-10). If this reasoning be true, a defendant would be foolish to settle federal direct purchaser claims except with an additional discount deep enough to cover liability to the indirect purchasers. This emphasizes one of the ways state indirect purchaser claims impair the value of federal direct purchaser claims.

CONCLUSION

The constitutionality of California's law allowing indirect purchaser claims is properly here on appeal. The issue is of key importance to antitrust enforcement. We respectfully submit that this Court should note probable jurisdiction and permit plenary briefing and argument.

Dated: October 6, 1986.

Respectfully submitted,

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